

MINUTES
MICHIGAN STATE TRANSPORTATION COMMISSION MEETING
March 28, 2002
Lansing, Michigan

Meeting noticed in accordance with Open Meetings Act, Public Act 267 of 1976.

Present: Barton LaBelle, Chairman
 Ted Wahby, Vice Chairman
 Betty Jean Awrey, Commissioner
 Lowell Jackson, Commissioner

 Charles Krupka, Commission Advisor
 Jerry Jones, Commission Auditor
 Vickie Plummer, Executive Secretary
 Pat Isom, Assistant Attorney General
 Greg Rosine, Director
 Larry Tibbits, Chief Operations Officer
 Wayne Niles, Bureau of Finance and Administration
 Gary D. Taylor, Bureau of Highway Technical Services
 Louis Lambert, Bureau of Transportation Planning
 Tom Maki, Office of Strategic Planning & Initiatives

Absent: John Garside, Commissioner

A list of those people who attended the meeting is attached to the official minutes.

Chairman LaBelle called the meeting to order at 9:10 a.m. in the Bureau of Aeronautics Auditorium, Lansing, Michigan.

COMMISSION BUSINESS

Commission Minutes

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to approve the minutes of January 17, 2002, as submitted. The motion carried on a unanimous voice vote.

PUBLIC COMMENT ON AGENDA ITEMS

Mike Nystrom, Assistant Executive Director of the Associated Underground Contractors (AUC), and Executive Director of the Michigan Pavement Association (MPA), provided the following comments on performance warranties. The construction industry joined the Michigan Department of Transportation (MDOT) in the development of a five-year materials

and workmanship warranty on road projects that require the contractor to guarantee their materials and workmanship on MDOT projects. More than 400 warranties have been implemented with success and quality seems to be continually improving.

Mr. Nystrom continued that, currently, the associations and MDOT have been working to develop a performance warranty for the M-6 project that is scheduled to be bid in the fall of 2002. Language has been developed that would allow contractors, who so choose, to develop innovative designs, while at the same time take on the added risk and responsibility of those design changes. The specifications also include language that allows a contractor the choice to stay with the MDOT design, and thus be held to a materials and workmanship warranty. The industry gave this specification approval with the exception of having six major legal questions answered, including the following: when are design changes going to be considered and how will that effect the bid bond; how are the evaluation and reporting going to take place; and, how will third party liability be handled. With these questions answered, the industry would help develop a specification.

Mr. Nystrom contends that, since that time, an addendum came out for a project on I-94 in Macomb County (Item 1 of Exhibit A-1, Proposal 0203033 of the March letting) which added a performance warranty to that job which in no way resembled the specification language that was worked out. He believes this to be a questionable decision because no paving company would have time to develop a pavement design to fit this project in 72 hours, unless they knew of the addendum ahead of time; and, the original specification was to be finalized by the fall of 2002. The new warranty requires a contractor to take on the design liability of the Department which may be contrary to public policy as set forth in Attorney General (AG) Opinion No. 5684 dated April 3, 1980. This opinion declares that a shift of liability from a public agency to a contractor in the negligence of a design is contrary to public policy and thus void.

A majority of the industry requested that the performance warranty addendum be pulled from the I-94 job, but the entire project was pulled from the March letting. The project is now advertised to be bid at the April 5 letting and the addendum is still in the proposal, and a similar version of the performance warranty has been added to another project on Telegraph Road.

As a representative of AUC and MPA, Mr. Nystrom requested the Commission to direct the Department to withdraw the performance warranty addendum from the I-94 and Telegraph Road projects.

Tony Milo, Executive Vice President of the Michigan Road Builders Association (MRBA), provided the following comments on performance warranties. MRBA has approved a comprehensive policy on the use of warranties in highway construction that outlined the criteria MRBA would use to evaluate all warranty specifications. MRBA has worked, in good faith, on a performance warranty specification for the upcoming M-6 project in Grand

Rapids. Throughout the process, MDOT representatives have said that the M-6 project would be the first test of a performance warranty in Michigan. There are some major issues to resolve, but much progress has been made on the M-6 warranty specification.

The performance warranty addendum placed on Proposal 0203022 from the March letting, which is now to be let on April 5, is significantly different from the performance warranty specification for the M-6 project. Mr. Milo believes the I-94 addendum circumvents the process and was implemented without industry-wide input. He also expressed belief that a similar performance warranty will be put in place on Proposal 0204035 (Item 2 of Exhibit A-1), Telegraph Road, in the April letting.

Mr. Milo furthered that MRBA contractors will stand behind their work, MRBA has never opposed warranties for highway construction, and they have an aggressive warranty program with the materials and workmanship warranties. Performance warranties, where a contractor is responsible for MDOT's design or must take responsibility to perform a design, is a profound change for the industry. Mr. Milo believes the change to Proposal 0203033 from the March letting was done without industry-wide input or advance notice, and is unacceptable to the association.

MRBA's policy states that MDOT must address the following questions in evaluating any warranty proposal: is it the most cost effective use of taxpayers' dollars; does the proposed change have a demonstrated added value; and, is the integrity of the competitive bidding process maintained. Mr. Milo does not believe MDOT contemplated these questions in regard to its performance warranty proposals. He furthered that MRBA conveyed specific suggestions to incorporate into the performance warranties, and none of those suggestions were included in the I-94 performance warranty.

Mr. Milo contends that MDOT circumvented the industry comment process and asked the Commission to rescind the performance warranty addendum that was placed on Proposal 0203033 from the March letting and not to allow the MDOT to impose a performance warranty on Proposal 0204035 in the April letting.

Bob Risser, Michigan Concrete Paving Association, supported the requests made by Mr. Nystrom and Mr. Milo regarding the warranty issues.

Greg Rosine, MDOT Director, commented that MDOT does have a history of materials and workmanship warranties which warrant contractors to do what they have been contracted to do. It has been MDOT's contention to move to performance warranties and MDOT has been working with the industry focusing on the M-6 project. This project has a different element than would be normal under other uses of potential performance warranties, and it is an alternate bid project. An alternate bid project provides comparability between specifications for asphalt and concrete to get both industries to bid on the job, which was done on the first project on M-6. This is not reflective of a majority of MDOT projects. The

difference between a materials and workmanship warranty and a performance warranty is that, under a performance warranty the contractor warrants that the pavement will perform in a certain fashion over a certain period of time. Using our pavement management system and knowing the history of pavements and how they perform, MDOT is confident that specifications the warranty has to meet will warrant that the roadway will perform in an excellent fashion over the entire design life. As the I-94 project was developed, the Michigan Asphalt Paving Association, who has been very interested in more aggressive performance warranties, suggested that the upcoming project in Macomb County, the majority of which is bridge work with less than one mile of pavement, would be a good test. One issue that needs to be addressed in a performance warranty is to see how it responds in a competitive bidding environment. The Director said he made the decision to test the process on a smaller project, prior to the large project on M-6, to be able to make further adjustments to the process.

The Director contends that the performance warranty was not written in secret, although it may not have had approval from all industry representatives. The life-cycle cost for the I-94 project determined that the pavement would be asphalt, so a determination was made to work with the one industry that wanted to pursue a performance warranty. Director Rosine did have concerns about the addendum coming out only 72 hours prior to the letting. MDOT's response to the concerns of the industry was to pull the project from the March letting, postponing it until the April letting, to allow the industry to review the special provision. The principal concern is that the integrity of the bidding process allows everyone in the industry to have time to review special provisions and submit their bids. The Director believes MDOT's response was appropriate and did give the industry enough time to review the special provision. The other issues involved will be tested in the bidding environment.

Pat Isom, Assistant Attorney General, commented that the AG opinion provided by Mr. Nystrom does not address warranties. It deals with a situation where a contractor is asked to indemnify a local unit of government for the negligence of a professional engineer, not hired by the contractor, but presumably working for the local unit of government. In this case, the Attorney General said that this was not lawful.

Mr. Isom furthered that this opinion does not apply to the current situation. The I-94 warranty calls for the contractor to design the mix for the asphalt, but not design the whole project. The warranty is limited to defects in the design or materials for the hot-mix asphalt. The contractor would not be liable for items designed by MDOT or designed by another contractor for MDOT. There is not a similarity of circumstances between this warranty and the AG opinion that was presented.

Director Rosine commented that, in the development of this special provision, MDOT did review this contract internally with the Attorney General's Office and the Office of Commission Audit to address issues of enforceability and its appropriateness as a

contract. He also noted that this section of pavement is less than one mile and is only two percent of the total project cost.

Vice Chairman Wahby questioned, in general, if a contractor warranties their materials only and something goes wrong on a project, how is a determination made on who is responsible, or if there are other issues that may affect product performance. The Director responded that the contractor would be held responsible for only those elements which they have under their control. There is a threshold of performance that the pavement has to meet over a period of time, i.e., not over a certain level of rutting or cracking. If within the course of the warranty the pavement does not perform, the contractor has the responsibility to correct the problems.

Chairman LaBelle commended the industry and MDOT for their successes in the "performance warranty journey." He also chastised the Department for issuing an addendum 72 hours before a contract was to be bid, but believes pulling the contract off the agenda last month was the right thing to do under the circumstances. He then asked if there would be an addendum to Proposal 0204035, as indicated by the industry. The Director replied there would not.

Chairman LaBelle asked for further comments from the industry. Mr. Nystrom commented that Mr. Isom was correct in that the mix is the only thing that is allowed to have innovation injected into the design by the contractor. He also noted his belief that the Department has full responsibility for the rest of the structure beneath the pavement, which allows for the inclusion of the AG opinion. Secondly, there is an MDOT minimum design on the asphalt mix and the contractor could choose to go with the minimum design on this project, in which case the issue would then go back to the AG opinion again.

Mr. Nystrom clarified that original performance warranty being developed would allow the contractor to choose a more innovative design, thus taking on the risk and responsibility of the long-term responsibility of a performance warranty, or to use the design of MDOT which are "minimum" standards, and take on a materials and workmanship warranty. He pointed out the industry is willing to stand behind its work, but contractors are not engineers, they build the jobs as laid out by MDOT.

Commissioner Jackson stated his understanding of the noted AG opinion to mean that if something is in opposition to public policy, then a contract that opposes public policy is void. Mr. Nystrom agreed.

Commissioner Jackson agrees there may have been a violation of due process when the Department was tardy in providing information to the industry. He also believes that the industry is nervous about providing warranties on projects they do not design. The Commission, by and large, is in favor of performance specifications. It is the Commissioners understanding that the industry is concerned that performance

specifications in the addendum places added risks to the industry and that the Department does not believe this to be so. Mr. Nystrom responded that a solid procedure for forensic investigation is not in place and that once rutting begins, the question will be whether the problem is the mix or the subbase and who is responsible. He believes this will only be answered in a court of law, and that taxpayers will not get an immediate fix on the roads.

Mr. Isom replied that the industry and MDOT have worked out an agreement on an arbitration process where the contractor would appoint a member to a panel, MDOT would appoint a member to the panel, and they both would select a third panel member. The panel would have a forensic investigation done, with both parties sharing the cost, and the panel would then make a decision. The process should not take long as it is not a court process. Mr. Nystrom believes that the process is in place, but there is a question of how the forensic investigation will take place.

Chairman LaBelle commented that the Commission plans to move forward with performance warranties and hopes the industry will continue to be involved in the process. It is understandable that many issues will have to be worked out as the process moves forward, but the Chairman noted his belief that bringing innovation and creativity to road products will benefit taxpayers.

Mr. Nystrom reiterated that MDOT and the industries were moving together toward the development of a performance warranty on M-6 that was to be bid in the fall of 2002, and wanted a complete specification that was workable for everyone. Suddenly, MDOT came up with a new performance specification that was different from what was developed together with the industry. The entire industry has been involved with the process since the beginning, but in the last four weeks only one group has been involved in the development of the new specifications.

Ed Noyola, representing Michigan Asphalt Paving Association (MAPA), commented that this association has no problem with the addendum on the job. He also noted that in Act 51, the Legislature asked the Department to move forward on the issue of warranties. Once the Department gave notice, it was in the best interest of MAPA to work with the Department to minimize risks to the contractors. When the Department was ready to start implementing the process, MAPA was ready to move forward and does support the addendum presented.

Mr. Nystrom reiterated that he represents contractors who do 40 percent of the asphalt paving in Michigan, separate from MAPA, all of which oppose warranties. He also noted that the surety industry is opposed to warranties. Mr. Nystrom respectfully disagreed with Mr. Isom's statement that the contractors' liability is limited under the I-94 specification, because the base will have an impact on the pavement which opens the contractor up to all liability on the project, which is contrary to the AG opinion.

Mr. Isom, responding to a question from Chairman LaBelle, noted that he has met with the surety industry to hear their objections and understands they do not want to take on the risk, just as the industry does not want to take on the risk. The Legislature, as well as the Commission, has indicated their desire to move forward on performance warranties. He furthered that the only way to know if a bond company will bond the job is to put it out for bid. The language of the specification clearly limits the responsibility of the contractors to the portion that the contractor has control over which is the design, workmanship and materials of the hot-mix asphalt.

In response to a question from Commissioner Jackson, Mr. Nystrom noted that if all legal questions were answered, and there was understanding as to how the questions were answered, AUC and MPA would accept the M-6 performance warranty on the two projects in question.

Mr. Isom noted he has not seen the specific questions in writing, but indicated that some of the items mentioned today were not legal questions. He furthered that on the I-94 warranty the contractor will only be liable if the conflict resolution panel determines that there was a defect in the pavement, not the subbase. On the M-6 project, it is Mr. Isom's understanding that the hope of the Department is to make the contractor responsible for the pavement and the subbase.

Chairman LaBelle asked the Department to move ahead with the process, identify and resolve problems that arise during the bidding process, and to move ahead with other projects. The Chairman also urged the Department to be sensitive in their communications with the industry.

The Chairman questioned if stone mastic asphalt (SMA) was used as a specification on the I-94 project. Director Rosine responded that SMA would not be used as it was estimated that only a one- or two-decibel noise reduction could be expected, which would not provide a noticeable difference.

It was moved by Commissioner Jackson, with support by Chairman LaBelle, to proceed with the contract process on Item 1 of Exhibit A-1 (Proposal 0203033). Department and industry representatives were urged to work toward finding answers to the referenced questions, and the Department was instructed to report back to the Commission at their April 25, 2002, meeting on the progress of performance warranties. The motion carried on a unanimous voice vote.

OVERSIGHT

Commission/State Administrative Board Contracts and Agreements (Exhibits A & Supplemental A)

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to grant approval to the Department to proceed with the contract process. The motion carried on a unanimous voice vote.

Bid Letting Pre-Approvals (Exhibit A-1)

It was moved by Commissioner Jackson, with support from Vice Chairman Wahby, to grant approval to the Department to proceed with the contract process, with the understanding there would be no addendum to Item 2 of Exhibit A-1 (Proposal 0204035). The motion carried on a unanimous voice vote.

Letting Exceptions (Exhibit A-2)

It was moved by Vice Chairman Wahby, with support from Commissioner Jackson, to grant approval to the Department to proceed with the contract process. The motion carried on a unanimous voice vote.

Information Items (Exhibit A-3)

This item was for information only and did not require a vote by the Commission.

Contract Adjustments

Gary Taylor, Chief Engineer/Deputy Director, Bureau of Highway Technical Services, reported on the contract extras and overruns, Exhibit B.

It was moved by Commissioner Awrey, with support from Vice Chairman Wahby, to approve the contract adjustments. The motion carried on a unanimous voice vote.

Recess

Chairman LaBelle recessed the meeting at 10:20 a.m., and reconvened the meeting at 10:30 a.m.

Six-Month Financial Audit Follow-Up Report (Exhibit C), Six-Month Internal Audit Follow-Up Report (Exhibit D), and International Bridge Administration Audit Report

Vice Chairman Wahby reported he has reviewed the financial audit follow-up, the internal audit follow-up, and the International Bridge Administration Audit Report and has discussed these issues with the Commission Auditor. The Vice Chairman expressed appreciation to the Department for completing work on many of the audit recommendations, and further encouraged the Department to continue to clear up their outstanding audit issues. It was then moved by Vice Chairman Wahby, with support from Commissioner Awrey, to accept the reports as submitted. The motion carried on a unanimous voice vote.

PRESENTATIONS

Chairman LaBelle congratulated Debbie Marshall on receiving her five-year service award.

Federal Legislative Update

Debbie Marshall, Federal Legislative Liaison, reported the President's budget reflected a massive cut in transportation funding which, according to law, was the right thing to do. Under the TEA21 bill, the mechanism that spends transportation funding is called the Revenue Aligned Budget Authority (RABA). The RABA funding mechanism is supposed to be based on a complicated formula through estimates of funding coming into the trust fund and then spending money the next year, which is based on accounting procedures by Department of Treasury. After the President's budget came out, the Department of Treasury found about \$650 million credited to a wrong account, questioning the accounting process used. The President has committed to reviewing this process for improvements.

Of the \$8.5 billion cut from the transportation budget, about \$222 million was cut from Fiscal Year 2003 funding to Michigan. MDOT and the Governor have been working very hard to get this issue resolved. After the National Governors Association meeting in February, a letter signed by 46 governors was sent urging Congress to fix RABA. Some proposals are starting to come in for a solution, but there is an issue on which method to use for funding levels.

The Michigan delegation has been working hard to get funding back for Michigan and the Commission was asked to support the delegation for their work on this issue. The Commissioners were also encouraged to write letters to the committees that are involved in this issue, outlining why Michigan needs the money to support our state.

Five-Year Road and Bridge Program

Denise Jackson, Bureau of Transportation Planning, provided information on Volume IV of MDOT's Five-Year Road and Bridge Program. Ms. Jackson noted that MDOT has received several awards including the American Association of State Highway and Transportation Officials (AASHTO) President's Award for their accelerated program delivery.

During the development of this program it was assumed that Michigan will retain full federal funding. At the state level, MDOT developed revenue estimates jointly with Michigan Department of Treasury, and the Diesel Equity and Simplification Proposal was introduced in the state Legislature. The Department is closely monitoring the national and state economic issues and legislation that affect transportation. The five-year program has become a way of communicating with our customers, provides a check point for managing

MDOT's financial strategies, and ensures road and bridge maintenance and preservation continue to be the Department's top priority.

Since 1999, more than 93 percent of the announced road and bridge preservation program has been completed, average remaining pavement life has increased by 21 percent, pavement condition of roads has improved, and the deterioration rate of bridges has been stabilized. A comprehensive safety program has been established for improved driver guidance, warnings for motorists leaving the roadway, and minimizing the consequences of leaving the road. Other program accomplishments include a work zone safety program, courtesy patrol program, wetland mitigation program, and aesthetic opportunities.

The 2002-2006 five-year program will total approximately \$1.2 billion annually, and repair and extend the life of 1,300 miles of road and 280 bridges annually. Major investment areas include pavement preservation, bridges, a passing relief lane program, capacity improvements, new roads, and environmental clearance and design of five major freeway projects using Build Michigan III funding.

Commissioner Jackson commended Ms. Jackson and the Department on the five-year plan presentation and for the inclusion of the requested information from last year's discussion. The Commissioner also requested the following information be provided in the next version of the five-year plan: the total number of jobs created as a result of all project funding, the same as noted in the transportation economic development fund projects; under the subject of congestion mitigation and air quality, an estimate of the tons of pollutants reduced as a result of the congestion avoided; and, savings to the users (i.e., reductions in gas use, accidents, vehicle body work).

Chairman LaBelle also commended the Department for the five-year program and their pavement management system, and congratulated them on receiving the awards from AASHTO.

The report was accepted as submitted.

RESOLUTIONS

Comprehensive Transportation Fund (CTF) Refunding Bond Resolution

Ed Timpf, Bureau of Finance and Administration, reported that this bond resolution would authorize the Department to pursue the refinancing of CTF Refunding Bonds, Series 1992-B to generate savings to the Department.

It was moved by Commissioner Awrey, with support from Vice Chairman Wahby, to approve the Comprehensive Transportation Fund Refunding Bond Resolution as submitted. The motion carried on a unanimous voice vote.

Resolution to Reprogram Bond Projects

Wayne Niles, Deputy Director, Bureau of Finance and Administration, reported that this bond resolution authorizes the notice of revision to the project list previously attached to the 2001 Resolution of the State Transportation Commission Authorizing the Issuance and Sale of State of Michigan Trunk Line Fund Bonds, Series 2001.

It was moved by Vice Chairman Wahby, with support from Commissioner Awrey, to approve the resolution to reprogram bond projects as submitted. The motion carried on a unanimous voice vote.

PRESENTATIONS

FieldManager Update

Doug Couto, Office of Information Management, reported MDOT was presented an award by CIO Magazine for their FieldManager project. Mr. Couto noted this project was made possible by team work and, after a short video presentation, presented the award to team leader Keven Fox, Construction and Technology Division. Mr. Fox provided a status report on the FieldManager system including current uses in Michigan, financial impacts, and possible future uses.

Chairman LaBelle and Commissioner Jackson congratulated the Department's team on receiving this award. Commissioner Jackson also cautioned that, since Michigan has centralized their information technology to a single department, innovations by MDOT may be inhibited. The Commissioner would like to receive future updates on this issue and how the Department is being affected by the centralization.

ADJOURNMENT

Chairman LaBelle congratulated Charlie Krupka, Commission Advisor, for receiving his five-year service award.

The Chairman adjourned the meeting at 11:25 a.m.

Commission Advisor